STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the investigation, on the Commission's own motion, into the electric supply reliability plans of Michigan's electric utilities for the years 2017 through 2021.	)))))	Case No. U-18197

At the November 21, 2017 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

To ensure resource adequacy and supply reliability of electric capacity in this state, the Commission, in following suit from prior years, initially opened the above-captioned case on January 12, 2017 (January 12 order), to obtain, from electric utilities regulated by the Commission, alternative electric suppliers (AESs), utility affiliates, and certain power supply cooperatives and associations, a self-assessment of their ability to meet their customers' expected electric requirements and associated planning reserves during the five-year period of 2017 through 2021.[1]

Shortly before January 12, 2017, Governor Rick Snyder signed Act 341 into law, which then became effective on April 20, 2017. Pursuant to Section 6w(8) of Act 341, each electric utility,

[1] This portion of the docket, addressing the Commission's annual electric reliability investigation for the five-year period of 2017 through 2021, opened prior to 2016 PA 341 (Act 341) becoming effective, was closed on July 31, 2017. *See*, the July 31, 2017 order in Case No. U-18197. Therefore, following July 31, 2017, this docket has been, and is being, used to address the new era of capacity demonstrations required under Act 341.

AES, cooperative electric utility, and municipally-owned electric utility must now demonstrate to the Commission, in a format determined by the Commission, that the electric provider owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or Commission, as applicable. Thus, Section 6w(8) of Act 341 has mandated a new form of annual capacity investigations to be conducted by the Commission, with new associated deadlines and remedies, the latter in the event an electric provider fails to demonstrate that it can meet a portion or all of its capacity obligation.

Recognizing these new requirements, the Commission subsequently opened Case Nos. U-18239, U-18248, U-18253, U-18254, and U-18258, for the five electric providers with choice load potentially affected by the state reliability mechanism (SRM) capacity charge requirement of Section 6w of Act 341; issued an order in those dockets directing the Commission Staff (Staff) to consult with the Midcontinent Independent System Operator, Inc. (MISO) and other parties to examine resources and develop recommendations; and engaged stakeholders through briefing and technical conferences to solicit input on, among other things, capacity obligations and the format for the demonstrations required of electric providers under Section 6w(8) of Act 341.

On September 15, 2017, the Commission thereafter issued an order (September 15 order) articulating its final determination as to the format and requirements for electric providers in the state to demonstrate to the Commission that they have sufficient electric capacity arrangements pursuant to Section 6w of Act 341.[2]

[2] On November 20, 2017, the Commission issued an errata to the September 15 order, correcting the approved reporting form for electric providers to use to submit their capacity demonstrations within Attachment A to that order. Additionally, as required by the September 15 order, the Staff filed its memo in Case No. U-18197 on October 27, 2017, with updated capacity obligations based upon MISO's Planning Year 2018-2019 Loss of Load Expectation Study Report. The Commission therefore notes that electric providers should use these updated planning reserve margin requirement unforced capacity percentages in their upcoming capacity demonstrations.

On October 13, 2017, Energy Michigan, Inc. (Energy Michigan) filed an expedited petition for rehearing/clarification (petition).[3] In its petition, Energy Michigan primarily seeks clarification on several issues, detailed further below for readability purposes, but also requests rehearing if the Commission finds such action is necessary in order to address the issues raised.

On November 3, 2017, Consumers Energy Company (Consumers) and the Staff filed answers to Energy Michigan's petition. While details of Consumers' and the Staff's answers will also be further discussed below, in conjunction with the issues raised by Energy Michigan, Consumers overall argues that Energy Michigan's petition "fails to meet the . . . standards for rehearing . . . ," claiming that "[Energy Michigan] should not be allowed to use a Petition for Rehearing to revise, modify, or present additional positions which were considered or could have been considered in the underlying proceeding." Consumers' answer, pp. 3-4.

Discussion

Rule 437 of the Commission's Rules of Practice and Procedure, Mich Admin Code, R 792.10437, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the close of the record, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

[3] On this same date, the Association of Businesses Advocating Tariff Equity and Energy Michigan also filed claims of appeal with the Michigan Court of Appeals, appealing the September 15 order. See Michigan Court of Appeals Docket Nos. 340600 and 340607, respectively.

In that regard, given the complexity and novelty of the issues involved in the September 15 order, under the new Section 6w of Act 341 paradigm, the Commission finds good cause to partially grant Energy Michigan's petition to provide further clarification on some of the issues raised.

1. The Commission May Lack Authority to Protect Confidentially Filed Documents

Energy Michigan raises concern that the Commission may lack statutory authority to treat all electric providers' filings as confidential, raising particular concern over the Commission's determination that supply contracts must be filed with the Staff. Energy Michigan states that "this [requirement] puts extremely sensitive business and customer information into the hands of a public entity that is subject to Michigan's Freedom of Information Act ('FOIA')[,] . . . and Energy Michigan is unable to identify any existing FOIA exemption that it feels decisively gives the Commission authority to withhold these contracts if they are requested under FOIA." Energy Michigan's petition, p. 2. Energy Michigan therefore requests that the Commission specifically articulate the nature and extent of the legal authority it relies upon to withhold supply contracts from disclosure outside of a contested case or, in the alternative, have suppliers, at the time capacity demonstration filings are made, file their supply contracts at a third-party office in Lansing, for such supply contracts to be held there and be made available for the Staff's review, upon one business day's notice. Energy Michigan believes "[t]his arrangement should alleviate concerns about providing Staff with rapid access to needed documents, and also avoid putting documents into the Staff's hands that they have to be responsible for protecting from FOIA or other requests." *Id*., pp. 2-3.

Consumers argues that, "[i]n the event the Commission determines that any aspect of AESs capacity filings is shielded from public disclosure pursuant to an exemption to FOIA, . . . all

electric provider capacity filings would need to be afforded similar treatment," pursuant to Section 6w of Act 341. Consumers' answer, p. 5. Consumers also asserts that Energy Michigan's alternative suggestion for off-site review is contrary to law, as Section 6w(8)(a) and (b) of Act 341 require demonstration to be made "to the Commission," and "should be rejected as inconsistent with the Commission's statutory duty to evaluate the filings of both utilities and AESs." *Id*., p. 5 (emphasis omitted). Consumers, in referencing the February 23, 2015 order in Case No. U-17751 and the protective order process utilized in that docket, further contends:

> . . . the Commission has previously demonstrated its capability to protect stakeholders from suffering harm associated with public disclosure of confidential, commercially sensitive information while also ensuring that information which affects the rights, obligations, and interests of other parties is duly considered by the Commission and available for review, where appropriate, by other parties.

Consumers' answer, p. 5. Thus, Consumers argues that "[t]here is no valid reason why other electric providers cannot make their capacity assessment filings under similar conditions." *Id*., p. 6. Consumers also contends that the pricing terms in an electric provider's supply contracts could be redacted and argues that private, off-site reviews of filings should be rejected if a show-cause proceeding were commenced.

The Staff acknowledges that documents filed at the Commission may be subject to FOIA, even those submitted under a confidentiality agreement. The Staff therefore also suggests an alternative option, similar to that made by Energy Michigan, but with the supply contracts being made available for the Staff to review, without the Staff retaining a copy, at the Commission's office in the presence of a designated party, versus at a third-party office in Lansing, as proposed by Energy Michigan.

In the September 15 order, FOIA was not discussed. Therefore, in finding good cause to address this issue now, the Commission finds that an electric provider may, in lieu of filing a copy

of its supply contract(s) with the Commission, elect to produce its supply contract(s) for the Staff's review, along with the Commissioners, if needed, in a non-contested capacity demonstration case by:

a) Filing a statement in the case, at the time capacity demonstration is made, agreeing to make its supply contract(s) available for review at the Commission's office, upon a one-day notice to the person designated in the letter to hold the supply contract(s), and

b) Upon request, having the designated person produce the supply contract(s) for review at the Commission's office in the presence of the designated party, without the Staff or Commissioners retaining a copy.[4]

2. Use of the 2018 Peak Load Contribution for the First Four-Year Demonstration Must be Made More Flexible

Energy Michigan identifies three main difficulties that it contends are associated with using 2018 peak load contribution (PLC) for four years without any means for adjustment.

First, Energy Michigan argues that if an electric provider experiences a significant decrease in load during that four-year period, the Commission's determination in the September 15 order would appear to require the electric provider to continue to supply that original PLC despite the load reduction, resulting in customers paying the costs for obtaining unnecessary capacity, a divergence from cost of service principles, an extremely inefficient allocation of capacity resources, and suppliers typing up capacity resources. Energy Michigan additionally contends that, through this process, "the Commission will have effectively created a locked-in-4-year market for Zone 7[,] and there will be no buyer seeking [excess] capacity in the interim period of the 4 years." Energy Michigan's petition, p. 4. Energy Michigan further asserts that costs for purchasing capacity several years forward will be higher than those available in the MISO planning resource auction (PRA) in any single year, causing suppliers being left with, and unable

[4] Evidence that an electric provider's supply contract(s) was/were reviewed would then be acknowledged in the Staff's report or a Commission order in the matter, or both.

to manage and recoup, stranded investments in capacity. According to Energy Michigan, "the imposition of an inflexible, 4-year load prediction systemically discriminates against AES suppliers and their customers." *Id*., p. 5. Energy Michigan therefore suggests that if an electric provider experiences a change in circumstances, it should be allowed to petition the Commission, in an *ex parte* process, to adjust its PLC for upcoming planning years, to "enable suppliers to adjust their capacity purchases to more closely track actual load variations." *Id*.

Second, Energy Michigan argues that "[l]ocking a customer into a 4-year capacity contract based on 2018 load reduces the incentive for that customer to implement demand response ("DR") or energy waste reduction ("EWR") programs, as they will lose the benefit of reduced capacity requirements from the implementation of those programs until the end of the four years." *Id*.

Lastly, Energy Michigan asserts that this process "disproportionately and unnecessarily adversely affects AESs and their customers," because AESs will be forced to delay any benefits arising from DR or EWR programs for up to four years. *Id*.

Contrary to Energy Michigan's arguments, Consumers contends that there is flexibility in this process, because the Commission, in allowing electric providers to plan to obtain up to 5% of their portfolio through the MISO PRA, has already recognized that fluctuations may occur, and, as also mentioned below, electric providers may be able to dispose of excess capacity in the MISO PRA or through bilateral contractual sales agreements. Consumers further states that Energy Michigan's concerns regarding the impact of DR and EWR programs on capacity demonstrations may be addressed in pending contested Case No. U-18444, as indicated by the Commission in its September 15 order. With regard to Energy Michigan's arguments pertaining to stranded investments, Consumers contends that this situation is plausible for all electric providers, not just AESs; however, Consumers states that the requirement to project load four years in advance was

mandated by the Legislature, without any available process for subsequent true-ups of actual load and supply. Consumers further claims that Energy Michigan "misconstrues the essence of the four-year forward demonstrations required by Section 6w of Act 341," arguing that:

> [t]he capacity demonstration is a *planning* issue . . . , [and] [i]f between the four-year forward capacity demonstration and the actual delivery year, the load to be served increases or decreases, then that is an *operational* issue that the affected load serving entity can address through buying or selling in the PRA or through bilateral contracts.

Consumers' answer, p. 8.

The Staff, while acknowledging the difficulties presented by Section 6w's adoption of a mandatory four-year forward requirement, particularly for electric providers who utilize a one-year-contract business model, states that "the statute is explicit in its terms." Staff's answer, p. 2. The Staff further argues that a change in demand between demonstration and the actual planning year "is not a problem that the Commission can solve for AESs." *Id*. Rather, the Staff asserts that the statute attempts to address intra-period customer switching and suggests that AESs may want to change their business model so that they no longer rely upon single-year contracts. And, with regard to Energy Michigan's arguments on DR and EWR programs, the Staff asserts that such energy efficiency programs can be accounted for in the capacity demonstration for the subsequent planning year, and there is no discriminatory impact on AESs, as DR and EWR programs affect all electric providers' capacity demonstrations the same.

Although the Commission sympathizes with Energy Michigan's concerns about the mandatory four-year forward capacity demonstration requirement set forth within Section 6w(8) of Act 341, the Commission, as a creature of statute, is bound by the requirements set forth by the Legislature. *See, Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988). In that regard, while Energy Michigan's petition on this issue is denied, the Commission

nevertheless encourages all electric providers, including AESs, to work with the Staff regarding changes in supply and demand that affect future planning years after their capacity demonstrations have been made. The Commission also reiterates that there is nothing prohibiting AESs (or any other electric provider) from buying or selling capacity after the initial four-year demonstration to account for actual load levels, which could be done bilaterally or through MISO's annual PRA.

3. Deferral of the Locational Requirement Based on the Supply Situation

For the reasons set forth in its prior filings in this case, Energy Michigan expresses its continued opposition to the setting of any locational requirement that is in addition to, or exceeds, what MISO already requires for all load serving entities (LSEs) in the zone. In acknowledging the Commission's decision on this issue, however, to set a locational requirement after the 2021/2022 planning year, Energy Michigan's chief concern is a "perceive[d] . . . inconsistency between the Commission's understanding that there is adequate capacity in the MISO zone over the next four years, and the restrictions on use of the MISO PRA during that same period [for capacity demonstration purposes]," an inconsistency which Energy Michigan believes "may arise due to an understanding of the nature and function of the PRA that is not current with how the auction functions today." Energy Michigan's petition, pp. 6-7. Energy Michigan, therefore, in providing an explanation of how the PRA works to provide capacity, along with additional information from the 2017/2018 MISO PRA for consideration, asks that the September 15 order be clarified "to state that the MISO PRA can be used for capacity demonstrations for the planning years during which the individual LSE locational requirement is deferred . . . , since such a determination is consistent with the Commission's determination that local resources are adequate for that period [to justify deferral of the locational requirement]." *Id*., p. 7 (footnote omitted).

Consumers contends that Energy Michigan is just repeating arguments previously made in this proceeding. Consumers further asserts:

> Energy Michigan's contention that AESs should be permitted to obtain 100% of their capacity resources from the MISO PRA in years 2019 to 2021 is nothing more than advocacy for the continuation of the risky status quo that existed prior to the passage of Act 341. The purpose of Section 6w of Act 341 is to ensure that . . . LSEs[] are planning for actual, specific capacity resources four years in advance, something that the PRA does not do. The PRA is only for a one-year term, and because it is only cleared several weeks before the Planning Year begins, it does not provide any kind of forward assurance that capacity will be available to purchase in the first place.

Consumers' answer, p. 10 (emphasis omitted). Consumers additionally argues that Energy Michigan "mischaracterizes" the PRA as "'a central mechanism of MISO's resource adequacy contract, not a side market for fringe adjustments,'" specifically pointing to comments MISO filed in this case on August 15, 2017, wherein MISO discussed states' reliance on MISO for continued access to residual resources. Consumers' answer, p. 10. In other words, Consumers argues that "the PRA is not designed to cover an LSE's entire position," in what Consumers contends is further evidenced by MISO's new forward resource auction proposal in 2016, for this very purpose, being denied by the Federal Energy Regulatory Commission (FERC). *Id*., p. 11, citing, in part, *Midcontinent Independent System Operator, Inc*, 158 FERC ¶ 61,128 (2017).

In response, the Staff argues that "[Energy Michigan's] arguments cannot change the words of the statute[,] . . . [a]nd allowing AESs . . . to plan to obtain 100% of the capacity needed to meet [their] capacity obligations would put the Commission in direct conflict with the express terms of Section 6w." Staff's answer, pp. 3-4.

Section 6w(8) of Act 341 explicitly requires that an electric provider demonstrate that it can meet its capacity obligations through sufficient capacity that is either owned or subject to contractual rights. Therefore, in following the letter of the law, and in finding no error in its

previous interpretation of Section 6w(8) of Act 341 and understanding of the PRA, the Commission finds that Energy Michigan's petition on this issue is denied. The Commission also notes that the determination that there appears to be available capacity supplies across the MISO footprint is not an appropriate justification to rely exclusively on the PRA. Section 6w of Act 341 was intended to ensure electric providers have arranged supplies (owned or contractual) four years in advance.

4. Capacity Transfer

Energy Michigan seeks clarification on the following procedural questions pertaining to capacity transfer and the last sentence of Section 6w(7) of Act 341:[5]

> If a customer moves from one AES to another during the 4-year period in which each AES load is set at the 2018 PLC, then how does the customer's capacity transfer to the new AES? And if it does transfer, does that put the old AES out of compliance, since it will no longer be meeting its 2018 PLC requirements, because its load has been reduced and capacity transferred away? What if the customer moves from AES service to utility service? Would that customer be paying only for utility distribution service during the pendency of the capacity contract that the AES had obtained, since the contract is to transfer with the customer and that customer would thereby already have capacity service at a previously contracted rate?

Energy Michigan's petition, p. 13.

Consumers, in response, states that the transferring of capacity resources is anticipated and separate from capacity demonstrations, such that "electric providers [are] free to engage in bilateral agreements to transfer capacity resources after the initial resource adequacy demonstration has been found sufficient." Consumers' answer, p. 9.

[5] The last sentence of Section 6w(7) of Act 341 states:

> If an alternative electric supplier ceases to provide service for a portion or all of its load, it shall allow, at a cost no higher than the determined capacity charge, the assignment of any right to that capacity in the applicable planning year to whatever electric provider accepts that load.

In response, the Staff states that, since Section 6w of Act 341 does not provide for any true-ups after a capacity demonstration is made, "[a] transferring AES would not be out of compliance with Section 6w [if a customer and corresponding capacity subsequently transfers after the capacity demonstration has been made] . . . ." Staff's answer, p. 4. As to Energy Michigan's other procedural questions on this issue, the Staff indicates that the statute provides that the cost must not be higher than the incumbent utility's capacity charge and how this capacity transfer is to actually occur would be determined between the AESs or the AES and the utility.

The Commission, in finding good cause to provide further clarification on this issue, reiterates that "an electric provider's initial capacity demonstration will *not* be re-examined . . . ." September 15 order, p. 33 (emphasis added). Therefore, future load fluctuations will not impact an electric provider's previous capacity demonstration that has been satisfactorily made. Additionally, aside from Legislative direction on assignment rights and cost for capacity transfers within Section 6w(7) of Act 341, the Commission, at this time, finds that all other procedural matters on this issue can be deferred to electric providers involved in a Section 6w(7) capacity transfer to decide.

5. Alternative Electric Supplier Use of Demand Response Capacity Resources from Another Alternative Electric Supplier

Energy Michigan requests clarification on whether an AES can use DR capacity from another AES's customers to meet its forward capacity demonstration and whether this could be effectuated through the use of a curtailment service provider, if the AES who contracts for the DR capacity ultimately bids the resource into the wholesale market. Energy Michigan, while noting that the Commission declined to address this very issue in its September 15, 2017 order in Case No. U-18369, argues that this issue "is within the scope of the proceeding in U-18197, . . . as it will

affect if and how AESs can use DR resources to meet their capacity obligations." Energy Michigan's petition, p. 14.

In response, the Staff states that it "believes that any DR that meets MISO's requirements for DR would also satisfy the requirements under Section 6w." Staff's answer, p. 4. The Staff, however, recommends that DR in capacity demonstrations be evaluated on a case-by-case basis, and if a DR capacity resource is from another AES's customer, additional evidence should be supplied, such as affidavits from both AESs supporting the capacity resource, proof that the customer's distribution utility was notified of the arrangement, and customer contracts that may be available.

The Commission finds good cause to provide further clarification on this issue. In that regard, in its March 29, 2016 order (March 29 order) in Case No. U-16020, pp. 7-8, the Commission previously stated:

> In light of the U.S. Supreme Court's decision [in *Fed Energy Regulatory Comm v Electric Power Supply Ass'n*, 577 US ___; 136 S Ct 760; 193 L Ed 2d 661 (2016)] and the filings in this docket, the Commission remains unpersuaded that it should now lift the ban that was placed into effect by the prior orders in this docket. The following concerns were raised regarding aggregation of demand response resources for sale in the wholesale market: (1) operational issues for Michigan jurisdictional utilities, on both the real-time and long-term bases, especially with respect to capacity planning and procurement as well as emergency operations; (2) lack of Commission oversight of third-party aggregators; (3) the possibility that customers may enroll a demand response resource in more than one demand response program; and (4) cross-subsidization. The comments did not adequately address these concerns, and therefore the Commission believes the prohibition should remain in place. The Commission does not intend by this order to foreclose the possibility of third party aggregation forever, but finds that, for the present, the prohibition should remain in place.

While the March 29 order continued the ban on aggregating resources for Michigan retail electric customers of Commission jurisdictional electric utilities, the March 29 order was silent on such a ban as it pertains to AES customers. Therefore, in light of this and the new capacity

demonstration requirements that provide for DR and energy efficiency to be used as a resource for meeting capacity needs, the Commission finds that AESs can use DR capacity resources from another AES's customers to meet their forward capacity demonstration obligations, provided that:

a) Affidavits supporting the resource are provided by both AESs involved,

b) The demonstrating AES provides evidence that the customer's distribution utility was notified of the arrangement, and

c) Customer contracts are made available for the Staff to review.

THEREFORE, IT IS ORDERED that:

A. The expedited petition for rehearing/clarification filed by Energy Michigan, Inc., is partially granted.

B. An electric provider may, in lieu of filing a copy of its supply contract(s) with its capacity demonstration, elect to produce its supply contract(s) for the Commission Staff's review, along with the Commissioners, if needed, in a non-contested capacity demonstration case by (1) filing a statement in the case, at the time capacity demonstration is made, agreeing to make its supply contract(s) available for review at the Commission's office, upon a one-day notice to the person designated in the letter to hold the supply contract(s), and (2) upon request, having the designated person produce the supply contract(s) for review at the Commission's office in the presence of the designated party, without the Commission Staff or Commissioners retaining a copy.

C. Future load fluctuations will not impact an electric provider's previous capacity demonstration that has been satisfactorily made.

D. Aside from explicit Legislative direction on assignment rights and cost for capacity transfers within Section 6w(7) of 2016 PA 341, all other procedural matters on capacity transfer

are deferred to electric providers involved in a Section 6w(7) capacity transfer to decide, at this time.

E. Alternative electric suppliers can use demand response capacity resources from another alternative electric supplier's customers to meet their forward capacity demonstration obligations, provided that (1) affidavits supporting the resource are provided by both alternative electric suppliers involved, (2) the demonstrating alternative electric supplier provides evidence that the customer's distribution utility was notified of the arrangement, and (3) customer contracts are made available for the Commission Staff to review.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

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Norman J. Saari, Commissioner

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Rachael A. Eubanks, Commissioner

By its action of November 21, 2017.

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Kavita Kale, Executive Secretary